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THE WAITANGI TRIBUNAL AND INDIAN CLAIMS COMMISSION;

CONTRASTING MECHANISMS FOR THE RESOLUTION OF DISPUTES

BETWEEN GOVERNMENTS AND THEIR INDIGENOUS PEOPLES

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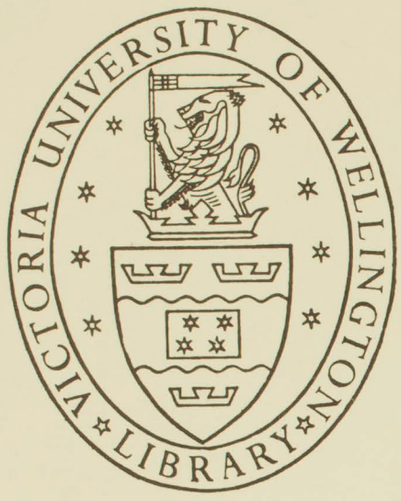

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THE WAITANGI TRIBUNAL AND THE INDIAN CLAIMS COMMISSION; CONTRASTING MECHANISMS FOR THE RESOLUTION OF DISPUTES BETWEEN GOVERNMENTS AND THEIR INDIGENOUS PEOPLES

A. INTRODUCTION

New Zealand as a nation has over the last fifteen years been forced to finally grapple with various political and legal issues relating to its indigenous people, the Maori. These issues have arisen as a result of the Maori people's growing awareness of the failure by the Crown to maintain its obligations under the Treaty of Waitangi of 6 February 1840. Their grievances take diverse forms and it is only recently that the general public has become aware of the wider ramifications of legal and political acknowledgement of the legitimacy of these claims.

Overseas and in particular Canada and the United States such issues have been handled by central government via various agencies and procedures for many years. This paper attempts to examine two devices established to handle what are relatively new responsibilities for central government, more so in New Zealand

Our own Waitangi Tribunal has been functioning since 1975, although only since 1982 in any significant capacity. In that time a unique institution has evolved to manage these multifaceted disputes between the Government and its native people. In the United States a federal agency was created in 1946 called the Indian Claims Commission. Its function and purpose was not dissimilar to that of the Waitangi Tribunal, namely to resolve longstanding grievances held by the native American Indian arising out of breached treaties, and negligent or dishonourable federal administration. This paper studies the two distinct bodies by means of their development, mechanics, approach and performance in an attempt to analyse whether such institutions can effectively resolve such disputes or at least whether such bodies have a positive role to play in their settlement.

B. THE WAITANGI TRIBUNAL

1. Introduction

In October 1975 the Labour Government passed the Treaty of Waitangi Act 1975. The legislation was a political response to increasing pressure from Maori for greater recognition of the Treaty of Waitangi and their grievances arising from its non-implementation.[1]

The Long Title and Preamble to the Act provides as follows:

> "An Act to provide for the observance, and confirmation, of the principles of the Treaty of Waitangi by establishing a Tribunal to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty.
>
> WHEREAS on the 6th day of February 1840 a Treaty was entered into at Waitangi between Her late Majesty Queen Victoria and the Maori people of New Zealand; And whereas the text of the Treaty in the English language differs from the text of the Treaty in the Maori language; And whereas it is desirable that a Tribunal be established to make recommendations on claims relating to the practical application of the principles of the Treaty and, for that purpose, to determine its meaning and effect and whether certain matters are inconsistent with those principles."

The Minister of Maori Affairs, Mr M. Rata commented on the Bill's introduction to the House on 8 November 1974.[2]

> The Bill arises from the Government's election undertaking on the Treaty of Waitangi, which was ... to examine the practical means of legally acknowledging the principles set out in the Treaty.

The Minister further commented "I have some personal reservations in that the provisions are not retrospective".[3] This was a reference to the limitation placed on the jurisdiction of the Tribunal preventing

it from investigating historic grievances arising prior to the enactment of the legislation. Accordingly, the Tribunal was not initially established as a formal dispute resolution device designed to finally resolve various Maori Treaty injustices. It was commissioned to investigate Maori grievances under the Treaty and to review Crown policy, practice and legislation, and make recommendations thereon but only as such matters arose post 1975.

In 1985 its powers of review were greatly extended back to 1840. Notwithstanding that large extension of jurisdiction the Tribunal's brief as contained in the terms of the original Act remained unchanged; yet the Tribunal within the last six years has undergone a startling metamorphosis. Its decisions on varied Treaty topics have had wide and significant legal and political impact. From what was first perceived as another quasi-political administrative body the Tribunal has emerged as an influential forum.

As the emphasis of today's Treaty issues move away from questions of whether legitimate historic grievances exist to ones of practical redress it may be that the Tribunal either within its existing terms of reference or as a result of some extension to its present powers best offers the appropriate procedure to provide working solutions. Currently participants in the debate advocate either legal or political process as the means of achieving long term settlement. The Tribunal may well provide an appropriate compromise.

2. Membership and Evolution of the Waitangi Tribunal

The Tribunal as originally constituted consisted of:-

- The Chief Judge of the Maori Land Court (who was to be the Chairman)
- One person appointed by the Governor-General on the recommendation of the Minister of Justice
- One person being a Maori, to be appointed by the Governor-General on the recommendation of the Minister of Maori Affairs.[4]

In 1985 the constitution of the Tribunal changed. The Chief Judge of the Maori Land Court remained the Chairman, however, the Tribunal's

membership was enlarged to six of whom at least four were to be Maori, to be appointed by the Governor-General on the recommendation of the Minister of Maori Affairs after consultation with the Minister of Justice.[5]

In 1988 the Act was amended again to increase the membership of the Tribunal to the Chairman and 16 members. The amendment also abandoned any racial qualification.[6] At the time of the amendment the Tribunal had some 150 cases before it. It was patently clear that the Tribunal was not able to cope with this huge caseload. Presently the Tribunal is able to sit in divisions with a minimum of three members and a maximum of seven in each division. It is hoped that with the Tribunal sitting in this manner it will be able to act simultaneously and perhaps clear the backlog in about 15 years.

In any analysis of decision making bodies, examination of the personnel who make up the entity is perhaps not considered an appropriate means of gauging that body's performance. Yet in the case of the Waitangi Tribunal, it cannot be ignored that the personalities who have been appointed as members of the Tribunal have to a large degree and perhaps not surprisingly had a considerable affect on the effectiveness of the Tribunal. Since the appointment of Chief Judge Durie as Chief Judge of the Maori Land Court and hence as Chairman of the Tribunal in 1982, the Tribunal has become a more vigorous and active institution. This change occurred prior to the extension of the Tribunal's jurisdiction in 1985.

It is notable that before the first members of the Tribunal could be appointed under the 1975 Act passed by the Labour Government there was a general election. The National Opposition who had been less than enthusiastic towards the Treaty Bill become the Government. Despite being critical of the Bill while in Opposition, the National Government appointed the first members in late 1976.

The Tribunal's inauspicious beginnings have been perhaps best illustrated by a number of commentators in their description of its first sitting on 30 May 1977 in the ballroom of the Hotel Intercontinental in Auckland. Mr Joseph Hawke and others of the Ngati

Whatua tribe of Orakei brought a claim in relation to fishing rights in the Waitemata Harbour. Almost a year later in March 1978 the Tribunal released a report which concluded that the claim was not well-founded and no recommendation was made.[7]

This early Tribunal also dealt with a second claim made in relation to the threat to traditional Maori fisheries in the Manakau Harbour from the proposed construction of a thermal power station. While the Tribunal concluded that customary Maori fishing grounds would be affected, it declined to make any recommendation. The proposed project was in fact finally abandoned and the claim became redundant.

Clearly, the Tribunal failed in those early years to meet Maori expectations and it was some five years before another claim was placed before it. The Tribunal failed dismally to gain the confidence of the Maori people or to promote itself as a forum where Treaty grievances could be heard. The Tribunal's procedure was clearly that of another pakeha administrative body similar to the Planning Tribunal or local planning committee. There was a failure to comprehend that in order for the Tribunal's findings to be viewed legitimately, be they negative or positive for Maori interests, the Tribunal itself had to be seen as a bicultural institution drawing from the Maori as much from the Pakeha. The Treaty was an agreement between two cultures, any body established to interpret and apply its principles to twentieth century New Zealand needed to represent that feature, not only in its membership but in its whole policy, approach and procedure.

In 1982 a claim was lodged by the Te Atiawa tribe of Taranaki claiming that a planned outfall from the Motunui synthetic fuel project (a key project in the Governments "think-big" energy policy of the early eighties) would further pollute their traditional fishing grounds.

The findings of the Tribunal were starkly clear. The rivers and reefs referred to in the claim constituted significant and traditional fishing grounds of the Hapu concerned and had suffered various degrees of pollution. As a result, the local Maori people were prejudicially

affected. The Motunui outfall would result in further destruction of the reef with the local Hapu being particularly prejudiced.

Further, the Tribunal concluded that current legislation gave insufficient recognition and protection for Maori fishing grounds. The policies or practices of statutory bodies did not give or were unable to give priority to Maori interests in fishing grounds over and above the general interest. The Crown was failing to make appropriate law to protect Maori fishing grounds from pollution and for the control of Maori fishing grounds by Maori people.[8] Accordingly, the Crown was in clear breach of its Treaty obligations.

The two major recommendations made by the Tribunal were that the proposal for an ocean outfall at Motunui be discontinued. Secondly that the Crown seek an alternative arrangement with the Waitara Borough Council for the discharge of the Syngas effluent through the Council's outfall.[9]

The Government's initial reaction to the recommendations of the Tribunal were not positive. The findings of the Tribunal however, were supported by a large environmental lobby group and a vocal pressure group opposed to the "Think Big" policy of the current administration.[10] Ultimately, the Government wavered. The Motunui water right was cancelled and substituted by a right to discharge via an alternative outfall through the Waitara Borough's existing effluent facilities. This ultimate resolution will later be referred to in this paper as a negotiated compromise: something less than the strict application of the Treaty. The Tribunal although clear in its determination of a breach of the Treaty softened its recommendation as to a practical solution. This feature would it is submitted become a recurring characteristic of Tribunal recommendations and will be referred to in some detail later in this paper.

The Te Atiawa claim must be considered as a watershed in terms of the Tribunal's development. How had this change come about?

(a) More strident Maori claims for the recognition of the Treaty. The growth of Maoridom had realised the Treaty of Waitangi Act

1975 itself. The development of the Tribunal's effectiveness was a logical progression of this movement.

(b) The claim had the support of a strong pakeha environmental lobby group, and there was significant public opposition to the "Think Big" projects. Accordingly, Maori aspirations were supported by popular opinion, if only for environmental and political reasons.[11]

(c) The personnel of the Tribunal gave the body a fresh focus, in particular its new Chairman, Judge Durie, greatly influenced the character of the decision and subsequent recommendations.[12]

(d) The new procedure of the Tribunal and its enhanced research resources rendered it a more qualified and accessible body.[13]

The hearing of the Motunui claim was held on a local Marae. In particular, respect was paid to Marae protocol. The Tribunal noted in its report that there was to be regard not only to civil law, but to Maori customary or ancestral law as well.[14] Such innovations assisted the Tribunal to gain the confidence of Maori who could perceive the Tribunal as being less mono-cultural than its early predecessor and certainly more sympathetic to their aspirations. It was this innovative approach to its procedure which marked the Waitangi Tribunal as being different from other boards and bodies. The Tribunal could be seen as a bicultural institution giving equal weight to traditional Maori custom.

In the years to follow, the Tribunal made recommendations in respect of a number of substantive claims:-

(a) The Kaituna Claim: On 30 November 1984 the Tribunal recommended to the Crown that sewerage should not be permitted to be discharged into the Kaituna River near Rotorua as it would prejudicially affect traditional fishing grounds.[15]

(b) The Manukau Claim: On 9 July 1985 the Tribunal recommended changes to policy and legislation and the implementation of a

plan to improve the environment of the Manukau Harbour. The claim involved a number of matters involving fishing, farming, industrial development and tribal land around the Manukau Harbour. Many of the issues fell outside the post 1975 jurisdiction of the Tribunal. This did not deter the Tribunal from venturing back before 1975 in order to establish whether breaches of the principles of the Treaty had occurred since that cut-off date.[16] The practical approach by the Tribunal highlighted the artificiality of limiting claims (intrinsically historic in their reliance on Treaty principles) to matters arising after 1975.

(c) The Te Reo Maori Claim: On 29 April 1986 the Tribunal recommended to the Crown that there be changes in education, broadcasting and state services policy to protect and promote the Maori language; the establishment of a Maori Language Commission and the legalising of the use of Maori in official proceedings. The Tribunal found that the Maori language was a taonga guaranteed to be protected by the Crown pursuant to the Treaty. The Crown had so far failed to actively protect the language.[17]

(d) The Waiheke Claim: On 2 June 1987 a claim in respect of the land on Waiheke Island was upheld by the Tribunal when it recommended to the Crown that the Waiheke lands be restored to the Ngati Paoa. The Tribunal found that the Crown by disposing of the Waiheke lands without enquiring as to the position of the Ngati Paoa (who had by that time become landless), had acted contrary to the Treaty.[18]

(e) The Orakei Claim: On 4 November 1987 the Tribunal recommended to the Crown that particular lands be returned to the Ngati Whatua who had become virtually landless, and that an endowment be granted by the Crown to assist in tribal rehabilitation. The Tribunal concluded that the tribe had lost its land through the acts and omissions of the Crown who had failed to protect the tribes interests contrary to the Treaty. What is of note also is that the Tribunal asked the Attorney-General to consider pardons and remissions of fines for protestors who had sought to bring

the injustices which had now been confirmed by the Tribunal to the attention of the Crown. This consideration however did not take the form of a "recommendation". The Tribunal noted that to breach the law in the course of protest was inconsistent with the Treaty. The Attorney-General declined to reconsider the offenders' position.[19]

(f) Muriwhenua Claim: On 8 December 1986 and 31 May 1988 the Tribunal submitted two interim reports to the Crown, the latter in relation to the ownership of fisheries by Maori and the wrongful assumption and control over those fisheries without prior negotiation contrary to the Treaty by the Crown. The first report recommended that the transfer of Crown land to S.O.E.'s not be made until Maori interests in the land could be protected.[20] Both reports had significant political and legal consequences.

(g) Mangonui Sewage Claim: In August 1988 the Tribunal concluded that the basis for a claim objecting to a Sewage Scheme had been made out, however, the interests of the community generally were such that no recommendation to change the site of a sewerage treatment pond should be made.[21]

The Tribunal dealt with a number of other claims throughout this period but declined to make any recommendations. It should also be noted that currently the Tribunal is considering the large Ngai Tahu South Island claim which includes claims to fisheries, lands and forests throughout the South Island. The Tribunal has yet to report in relation to the land issues associated with the Muriwhenua claim.

3. The Treaty of Waitangi Act 1975 and the Procedures of the Tribunal

The functions of the Tribunal are two-fold.

(a) Pursuant to Section 8 the Tribunal is empowered to examine and report on whether any proposed legislation is inconsistent with the principles of the Treaty. Such legislation can be referred to the Tribunal by resolution of the House of Representatives in

the case of a Bill and in the case of any proposed Regulations, or Orders in Counsel by any Minister of the Crown. The Tribunal's report is to be submitted to the Speaker in the case of a Bill and in the case of any subordinate legislation to the appropriate Minister. A copy of the report is required to be tabled in Parliament.

(b) Pursuant to Section 6 of the original Act the Tribunal is further empowered to consider claims by any Maori or group of Maori likely to be prejudicially affected by any form of legislation, Crown policy or practice, or any acts done after the commencement of the empowering legislation on 10 October 1975. That limitation was subsequently repealed in 1985 and the jurisdiction of the Tribunal extended back to 6 February 1840.

Pursuant to Section 6(3) if the Tribunal finds that any claim is well founded, it can, if it thinks fit, having regard to all the circumstances of the case recommend to the Crown that action be taken to compensate for, or remove the prejudice, or to prevent other persons from being similarly affected in the future. This recommendation can either be in general terms or can specify the action the Crown should take in the given case. Subsection (5) provides that a sealed copy of the Tribunal's findings and recommendations, if any, are to be served on the claimant, the Minister of Maori Affairs and any other such Minister of the Crown, who in the opinion of the Tribunal have an interest in the claim and any other person the Tribunal thinks fit.

Section 7 gives the Tribunal a discretion not to enquire into certain claims if they are trivial, frivolous or vexatious or not made in good faith, or if in the circumstances an adequate remedy or right of appeal, other than the right to petition Parliament or to complain to the Ombudsman is available to the applicant. Of note is the claim by Tom Te Weehi who had been convicted in the Christchurch District Court of breaches of the Fisheries Regulations. The Tribunal declined to hear his claim of customary Maori fishing rights until Court proceedings had finished. Subsequently Te Weehi was partially successful on appeal to the High Court which confirmed his traditional

fishing rights notwithstanding the existence of regulatory limitations. He subsequently withdrew his claim.[22]

In 1985 an amending Act reconstituted the Tribunal in the manner previously outlined. The most significant development however was the enlargement of the Tribunal's jurisdiction back to 6 February 1840. Since that amendment in 1985, the membership of the Tribunal has been increased, as have its administrative and research resources.

A further significant development to the legislation was the Treaty of Waitangi (State Enterprises) Act 1988 which amended both the Treaty of Waitangi Act and the State Owned Enterprises Act. It has extended the power of the Tribunal in a manner which it is ventured was never contemplated when the Tribunal was first established in 1975. The 1988 legislation, a product of the Court of Appeal decision The New Zealand Maori Council v. Attorney-General & Others[23] effectively provided that no future claimants to the Tribunal would be prejudiced through the transfer of Crown land to State Owned Enterprises. The procedure enacted was to provide that any land so transferred was to be subject to a memorial being registered on the Certificate of Title of that land to the effect that it was subject to resumption by the Crown on the recommendation of the Tribunal. The Treaty of Waitangi (State Enterprises) Act 1988 went on to provide that if the Tribunal recommends a return of the land transferred to a State Owned Enterprise and no agreement can be reached with the Crown in relation to that recommendation for its return, the Tribunal's recommendation will be binding.[24] The Tribunal has accordingly become albeit in a limited area, a body of final determination.

Also of note, is the opportunity given to State Owned Enterprises to apply to the Tribunal for clearance of the restriction placed on its title.[25] Accordingly, provision has been made for a non-Maori applicant to commence its proceedings within the Tribunal's jurisdiction.

The Second Schedule to the Act as amended in 1988 provides for administrative and procedural matters. Clause 5 of the Schedule allows for the Tribunal to conduct hearings, adjourn and meet in

private or in public. Further, the Tribunal has the power to regulate its own procedure. The Tribunal has now made it a practice of conducting at least one of its hearings on an appropriate marae to hear the claimant's case. Clause 5(6) allows the Tribunal to have regard to, and adopt such aspects of "te kawa o te marae" as the Tribunal thinks appropriate in the particular case, but it is confirmed that no person shall be denied the right to speak during the proceedings of the Tribunal on the grounds of their sex. Marae protocol requires certain changes from conventional courtroom procedure. Witnesses are not required to take an oath or affirmation, although it is pointed out that "sanctions against not telling the truth on the Marae are at least as great as those applicable in the courtroom". It should also be noted that the Tribunal is subject to judicial review and is bound by the rules of natural justice.[26]

The Tribunal's quorum must consist of at least three members of the Tribunal, including a presiding officer of whom at least one shall be Maori. A presiding officer may be, the Chairperson, a Judge of the Maori Land Court appointed by the Chairperson to so act or a member of the Tribunal appointed by the Chairperson who must be a barrister or solicitor of at least 7 years standing.

Clause 5 further provides that in the event of disagreement, the Tribunal's decision shall be the majority of the members dealing with the matters, or if equally divided, the decision of the presiding officer.

The Tribunal may act on any testimony, sworn or unsworn and may receive as evidence any statement, document, information or matter which in the opinion of the Tribunal may assist it to deal effectually with the matters before it. Of note however, is that the Evidence Act 1908 shall apply to the Tribunal in the same manner as if the Tribunal were a court within the meaning of the Act.

Clause 7 provides that any claimant may appear in person, or by leave of the Tribunal by counsel or other representative. Due to the factual and legal complexity of most of the claims, claimants and the Crown are represented by counsel. It is apparent that certain Crown

counsel and indeed other practitioners in private practice are accumulating experience in appearing before the Tribunal and that this experience is to the assistance of the Tribunal.[27]

Clause 7A provides that the Tribunal may appoint counsel to either assist it in respect of the proceedings or may appoint counsel to assist the claimant if it is satisfied that it is of sufficient complexity and importance to warrant such an appointment. Such counsel shall be paid by the Crown.

Clause 8 provides that the Tribunal shall be deemed to be a Commission of Inquiry under the Commissions of Inquiry Act 1908 and be subject to the provisions of that Act with the exception of Sections 11 and 12 which relate to costs. The Chairman of the Tribunal may summons witnesses to attend.

Clause 9 allows for the appointment under the State Services Act 1962 for a registrar of the Tribunal and more importantly for such research officer or officers, or other staff necessary for the efficient operation of the Tribunal. The Tribunal is further empowered to commission any person whether or not a member of its staff to investigate any matter relating to a claim and prepare and submit a report for consideration by the Tribunal. That report may be received in evidence. A copy is made available to all participants to allow them to make submissions if they see fit. The Tribunal regularly arranges for research to be done on the historic background of the claim either by its own staff or by contracted researchers.

The Tribunal sits very much as an inquisitorial body, dependent to a large extent on its own research and resources. It is not involved in the adversarial process of determining a winner, rather it is involved in ascertaining a factual foundation upon which a decision can be made. Its procedure, much of which is self-imposed at its own discretion is designed to facilitate this function. The Waitangi Tribunal is clearly not a court in terms of the traditional definition of that word.

As stated the Tribunal sponsored research is made available to both the Crown and the claimants. A Pre-Trial Conference is held; with all counsel attending to discuss the mechanics of the hearings, issues, dates, times and witnesses. The first hearing is held on a marae with the proceedings being influenced by traditional Maori custom. The claimants case having been put the Tribunal adjourns to allow the Crown time to prepare its case in answer to the claimant's. The second hearing is invariably held in a European setting, either a hall or courtroom and in accordance with more typical courtroom procedure.[28]

4. The Principles of the Treaty and the Power of the Tribunal

Clearly one of the major consequences of regular Tribunal decisions is the development of Treaty principles or jurisprudence. This paper does not attempt to analyse those principles. The future of the Tribunal however is inextricably linked with the manner in which it interprets the Treaty, adduces Treaty principles, and renders Treaty jurisprudence consistent and certain. Some reference to these principles illustrates where the Tribunal stands in relation to the traditional courts of law and the government.

A Tribunal member, Mr D. Wilson makes the point that the Tribunal has as its function the task of "investigating whether the actions complained of are inconsistent with the principles of the Treaty, not with either or both of its two texts".[29] Where the Treaty has been referred to in Statute - the State Owned Enterprises Act 1986, Environment Act 1986, Conservation Act 1987, it is to "the principles of the Treaty". Accordingly, a determination of the principles of the Treaty goes to the very heart of the Tribunal's existence and function. Indeed, Judge Durie has stated that the Tribunal's "recommendations are perhaps not as important as its building up of a data base from which informed national strategies can be planned".[30]

Clearly the "principles of the Treaty" are of greater importance than the text of the Treaty itself. Ultimately these principles will be determined by the courts when called upon to interpret legislation. Yet as exemplified in the Maori Council case[31], so much of what the Court of Appeal cited as principles of the Treaty had previously been

determined by the Tribunal. The Court of Appeal approved those principles but clearly was not willing and indeed could not acknowledge the Tribunal's findings as the source of those discerned Treaty principles.

In the NZ Maori Council case, Cooke P. noted that the opinions of the Waitangi Tribunal should be given much weight but were not binding on the court.[32] While Somers J. noted that court decisions were binding on the Waitangi Tribunal.[33]

Three interesting observations were made by the Parliamentary Commissioner in respect of that dicta.[34]

The Waitangi Tribunal:

(a) has the expertise and experience to define principles.

(b) Under present law neither the courts nor the Crown are obliged to agree with the Tribunal's findings.

(c) The Waitangi Tribunal membership reflects the Treaty partnership, the courts do not.

While the necessity for the courts independence to look afresh at Treaty issues cannot be disputed the expertise, experience and membership of the Tribunal cannot be ignored. Such factors render the Tribunal's decisions legitimate and authoritative and accordingly it is submitted most influential.

In terms of the formulation of Treaty principles - both the courts and the Tribunal agree that the Treaty is a living document and should be interpreted as such. However, both recognise that it is a fundamental constitutional rule that the law should be clear, accessible and accurate. It is crucial that there are clearly identifiable principles or guidelines, hence the reiteration of such fundamentals as Treaty partnership, tribal self-determination and active protection by the Crown, by both the Tribunal and the courts.

The issue of the standing of the reports of the Waitangi Tribunal was recently considered by Eichelbaum C.J. and McGechan J. in the High Court at Wellington in Ngai Tahu Maori Trust Board & Others v. Attorney-General & Others[35]. The High Court issued rulings on the effect and admissibility of the Waitangi Tribunal's Muriwhenua report in the Maori Fishing cases.

The High Court held that the Muriwhenua report was not binding in Court proceedings as it referred to political not legal reality. The Tribunal reports were described as the "stuff of Government and not of law". The report was however admissible pursuant to Section 42 of the Evidence Act 1908 as evidence of fact and opinion on a matter relating to Maori bearing on the interpretation of the Treaty of Waitangi and the Fisheries legislation, and as material relating to Maori fishing practices. It was noted that its weight however may be affected by weaknesses in the report, and questions of base material and resources might arise. The High Court commented however that it would not be "so precious as to shut out that which is of value for fear of that which is not".[36]

The court confirmed that while the Tribunal may have determined a Treaty issue the matter in no way could be considered as res judicata nor would any litigant be estopped from arguing the matter afresh before a court of law.

While the courts have readily pointed out that they are obviously not bound by the findings of substance by the Tribunal and perhaps have distanced themselves from the influence of Tribunal findings the judiciary has given some weight to the proposition that the Crown may be obliged to follow its recommendations. Commentators have raised the issue of whether the Crown's failure without reasonable justification to give effect to a Tribunal recommendation may in itself constitute a further breach of the Treaty.[37] Cooke P. stated in the Maori Council case;[38]

> If the Tribunal finds merit in a claim and recommends redress it would only be in very special circumstances that the Crown as a

> reasonable Treaty Partner, could justify withholding it - which would be only in very special circumstances if ever.

One of the principles identified by Professor Orr's analysis of the Tribunal reports is that the Crown has a duty to remedy past breaches of the Treaty.[39] While Cooke P. preferred to keep the question open as to whether the Crown ought to grant the precise form of redress recommended by the Tribunal, the Court of Appeal has given a strong direction to the Crown that failure to act on Tribunal recommendations may lead to further claims. Such claims however, arising out of perhaps a current administration's failure to give effect to a Tribunal recommendation might have the effect of politicising the Tribunal. If the government felt bound to implement such recommendations it may favour the appointment to the Tribunal of those individuals who favour the government's view. That should be avoided.

The Parliamentary Commissioner for the Environment has concluded in relation to Tribunal recommendations that...[40]

> the Crown must show that the alternative will be as likely to attain improved environmental quality, take full and balanced account of the principles of the Treaty ... and that:
>
> The Tribunal to date has shown sensitivity to all of these matters in making its recommendations but the Crown is not acting on Tribunal advice and has so far failed to demonstrate that its chosen alternative will provide an equivalent or improved result.

The Commissioner's view is that the Crown has no scope to move away from a complete implementation of recommendations unless it can provide an equivalent proposal sufficiently comparable to that recommended. The position is obviously enhanced where relevant legislation provides for the consideration of Treaty principles. It is difficult to accept however that there can be no room for policy discretion by the Executive which may conflict with the intent of a Tribunal recommendation. It is doubtful whether such a limitation on executive power is either feasible or possible in our constitutional system. Judge Durie has stated that the Tribunal's lack of final or

binding power of determination may be an advantage and that it is perhaps best that it has no ultimate power. He maintains that should the Tribunal be given such power a degree of flexibility will be lost and the Tribunal rendered less able to grapple with many of the issues it currently adjudicates on.[41]

> The flipside to the lack of any power of final determination is that Maori claims should hot be constrained by a need to fit the parameters of strict legal rights.

As the Tribunal is not confined by the normal rules of law because it does not have the power of final decision, subject to the rules of natural justice, it may adapt its procedures to accommodate Maori claimants.

P.G. McHugh has suggested that the Tribunal could be given coercive powers in cases where the Government indicates an unwillingness to act or accept recommendations that it makes.[42] That type of development may threaten however the "para-legal" approach which the Tribunal currently operates under. Claims at the moment are not restricted by political realities. Clearly the Tribunal has as its prime function the settlement of facts upon which a decision can be based. As a Tribunal it investigates and advises not just the Crown but the public. If its recommendations were to become binding, how political would the Tribunal become? What loss in its objectivity and impartiality would be perceived?

It is submitted that the Tribunal's early failure may well have been its political unwillingness to confront the government of the day with findings at odds with current Government policy. Notwithstanding this, the Court of Appeal is strengthening the authority of the Tribunal's recommendations and the Treaty of Waitangi (State Enterprises) Act 1988 has indeed given the Tribunal an ultimate decision making power.

5. The Success of the Tribunal to Resolve Conflict and Provide Solutions

It is suggested that the Tribunal's mana and influence continues to rise because it has shown an ability to resolve what are potentially massive national issues in a feasible manner. This can be illustrated by a review of basic issues of treaty interpretation and of a number of claims and resulting Tribunal recommendations.

(a) The English and Maori texts of the Treaty - An Issue of Interpretation

The preamble to the 1975 Act acknowledges the different texts - the English and Maori version of the Treaty. The Tribunal is specifically directed by the Act to determine those conflicts.

The concept of sovereignty as found in the English text is to be compared with "rangatiratanga" - in the Maori version. The Tribunal has not shrinked from finding that the use of the term "Rangatiratanga" allows for a continuation of "Maori sovereignty" within the parameters of a tribal context. A comparison can be made with the sovereignty of the Indians of Canada and the United States which was not ceded in the North American Treaties. This sovereignty was acknowledged by the Canadian and United States Governments. A distinction has been made by the Tribunal however between the ceding of a right of "national" government and the authority of Maori to manage their own affairs.[43]

The conclusion of the Tribunal in its Muriwhenua Fisheries report (1988) concludes that the Maori text of the Treaty did sufficiently grant the Crown sovereignty. The Tribunal equally lucidly concluded however that the cessation of sovereignty in Article 1 of the Treaty was subject to its obligations and responsibilities outlined in Article 2. That fundamental finding has established a foundation upon which the Tribunal may consider claims within a clearly defined framework.

In the earlier Motunui claim, the Tribunal made some observations in respect of the possible conflicts between the two texts. These statements were largely based on a memorandum submitted by the

Department of Maori Affairs.[44] Lord McNair's text, "The Law of Treaties" was cited to the effect that "in the absence of a provision to the contrary, neither text is superior to the other". However, it was argued that should any question arise on which text should prevail, the Maori text should be treated as the prime reference since this was the text signed by most of the Chiefs. The Tribunal remains silent in respect of this proposition. The Tribunal did observe that it did not feel bound to confine itself to a literal interpretation of the Treaty. That it would have regard to extraneous means of interpretation such as the consideration of surrounding circumstances and that Treaties were to be interpreted "with reference to their declared or apparent objects and purposes" and even "the subsequent conduct and practice of the parties in relation to the Treaty".[45]

While the Maori Affairs paper cited decisions of the United States Supreme Court to the effect that treaties made with Indian Tribes were to be construed "in the sense which they would naturally be understood by the Indians",[46] the Tribunal held that it was consistent both with European legal concepts and with the Maori approach that the Treaty's[47]

> wairua or spirit is something more than a literal construction of the actual words used can provide. The Treaty transcends the sum total of its component written words and puts narrow or literal interpretations out of place.

This interpretation of the broad spirit of the Treaty was confirmed in the Maori Council case where Richardson J. stated "What is important for present purposes is the approach and the emphasis, rather than the differences".[48]

Judge Durie has stated in respect of this accommodation of the two Treaty versions[49]

> ... If we follow then the spirit of the Treaty, as gleaned from the surrounding circumstances there are few problems in the textual variations. If the texts are read to supplement and compliment each other, the differences are few. It is not a case

> of deciding for the one text or the other, but rather of blending and harmonising the two.

Judge Durie acknowledges the importance of the argument that the Maori text of the Treaty which was taken around the country was relied upon alone by Maori. However, he notes that the Tribunal has been directed to consider both texts and that it must be acknowledged that the other party, the Queen's representative, relied equally on the English text notwithstanding the rule in Jones v. Meehan[50] to the effect that the text in the indigenous language should be used in the event of an ambiguity.

(b) Motunui Claim

In the Motunui claim, while the Tribunal accepted the Treaty ceded sovereignty to the Crown it did not accept the interpretation of "rangatiratanga" as merely possession, but could be taken to mean "the highest Chieftainship". Accordingly, the Waitara fishing grounds was a tribal taonga pursuant to the Second Article of the Maori text of the Treaty, which afforded Maori people not only protection of the possession of their fishing grounds, but also their "Mana" to control them in accordance with their own customs.[51]

As M.P.K. Sorrenson notes, such a finding had wide ranging consequences as it "struck at the very heart of the longstanding pakeha doctrine that the transfer of sovereignty in Article 1 provided the foundation for one system of law, British law".[52] Despite that "potentially radical finding" the Tribunal's final recommendations were "mild and conciliatory". The Tribunal had regard to the long title and preamble of the 1975 Act which referred to its responsibility when making recommendations for the "practical application of the Treaty". The Tribunal noted that it was not[53]

> ... inconsistent with the spirit and intention of the Treaty that the Crown and Maori people affected should agree to alter the incidence of the strict terms of the Treaty in order to seek acceptable, practical solutions.

That construction of interpretation would be repeated in following claims. Despite a clear finding of the Crown's breach of the Treaty, with consequential wide implications for the nation as a whole, the Tribunal in making its recommendation thereon assessed the best practical solution. The Tribunal noted that the Treaty was capable of adaptation to meet new circumstances and modern times. It need not lock society into a 1840 status quo.

(c) Manukau Claim

In the Manukau claim despite upholding in most parts the multifaceted claim, the Tribunal's recommendations were mild and conciliatory. The Tribunal noted that it would be unfortunate if Maori fishing rights fell to be determined on a literal interpretation of the Treaty which provides exclusive rights to all Maori fisheries. The Tribunal noted that it was necessary to make compromises to minimise conflict between Maori, private and commercial fishing interests and that various solutions should be canvassed for the recognition and protection of Maori fishing grounds and for compensation for such lost fisheries.[54]

In respect of the claim regarding New Zealand Steel's slurry pipeline which sought the transfer of water from the Waikato River into the Manukau, the Tribunal concluded that while such a transfer may be culturally offensive, the Tribunal noted:[55]

> In our multi-cultural Society, the values of minorities must sometimes give way to those of a predominant culture, but in New Zealand, the Treaty of Waitangi gives Maori values an equal place with British values and a priority when the Maori interest in their taonga is adversely affected.

Despite that acknowledgement and despite a recommendation for a change in New Zealand laws to admit Maori values, it was accepted that a water right to discharge water into the Manukau had been granted and it was hoped that an acceptable compromise with the claimants could be reached.

(d) Te Reo Maori Claim

The Te Reo Maori claim, unlike the Manukau claim was confined to a single issue. Despite its simplicity, the Tribunal acknowledged it as being one of its most difficult insofar as it opened up political, social and financial ramifications.[56]

The Tribunal concluded that[57]

> ... by the Treaty the Crown did promise to recognise and protect the language and that this promise had not been kept. The guarantee in the Treaty requires affirmative action to protect and sustain the language, not a passive obligation to tolerate its existence and certainly not a right to deny its use in any place.

Having come to that conclusion, the recommendations by the Tribunal were reconciliatory and practical. The Tribunal declined a demand that all public documents, notices and newspapers should be printed in both Maori and English - largely on the ground of expense. While the Tribunal recommended that Maori ought to be allowed to be used in courts and when dealing with Government Departments or Local Authorities, it was not willing to require fluency in Maori as a prerequisite to employment in the civil Service. The establishment of a statutory body to supervise and foster the use of the Maori language was recommended.

Thus, in the Te Reo Maori claim as in earlier ones, the Tribunal's findings were potentially radical, but its recommendations were mild and accommodating and could be achieved without much pain or expense to the predominant pakeha community.[58]

(e) Orakei Claim

The Orakei claim followed a similar pattern. The claim was upheld. The Tribunal noted that the vesting of the whole of the land in question, then in communal ownership to thirteen members of the Ngati Whatua as legal owners to the complete exclusion of the great majority necessarily destroyed the Mana and authority of the Tribe over its land. The Crown had failed to comply with its statutory or Treaty

obligations to ensure the Tribe would not be rendered landless. This earlier application of the Native Lands Acts of 1865 and 1867 was aggravated by the seizure under the Public Works Act of a ten acre block which resulted in the destruction of the Tribe's Marae in clear breach of the Treaty.[59]

Despite this clear finding of "illegal" Crown confiscation of what was now highly valued Auckland real estate, the recommendations of the Tribunal in respect of the Orakei claim were "restrained and achievable". It was accepted that the bulk of the land confiscated by the Crown had already passed into private ownership and that the remainder of state houses which had been built on the land had passed into private ownership. It recommended that preference be given to Members of the local tribe in the allocation of state housing in the area and a number of monetary arrangements be entered into to provide some compensation. This arrangement was based not upon recompensing the tribe in terms of the capital value of the land, but in a way that could provide it with an adequate economic base for the future.

(f) Mangonui Claim

In its Mangonui Sewage Report the Tribunal found the Crown to be in breach of the Treaty as there had been a failure to take Maori concerns into account when decisions on the sewage scheme were being considered.

The Tribunal noted:[60]

> The Treaty ... requires a balancing of interests in some cases, and a priority for Maori interests in others. This is one occasion where a balancing is needed and some compromises must be made ... The scheme, we note, has been arranged and changed to reduce the cultural impacts, and the continued possession and enjoyment of tribal land and fisheries is not in the circumstances unduly encroached upon.

And found that:[61]

> Having regard to the customary opinion that wastes defile that which is esteemed, Maori planning would require the works to be elsewhere... [however] the ponds should be resited... only if there are reasonably practical alternatives... Of the alternatives proposed, none is sufficiently free of other problems to warrant Parliamentary intervention to require the ponds' relocation.

It is submitted that the Tribunal has repeatedly shown its ability to provide working solutions to what are complicated, emotive, economic and potentially far-reaching issues. Judge Durie credits the Tribunal's achievements to its present powers (or lack of power), its flexible procedures and inquisitorial function.[62]

> The Waitangi Tribunal represents, in my view, a good intuitive response from the politicians, for although the Tribunal is not in the mainstream of the law, neither are many Maori claims.

He stresses that Maori claims like all indigenous minority's claims are both justiciable and non-justiciable in character. Many claims are really political matters. While customary hunting and fishing rights could be readily defined by statutory enactment and would be clearly justiciable, such claims raise wider issues as to resource management and development policies. These larger questions are not justiciable coming within the broader ambit, not of legal rights, but of broad policy. Judge Durie notes that claims relevant to the Treaty of Waitangi extend from claims in respect of specific lands or fishing grounds to the claims for greater Maori participation in society and the sharing of political and economic power. Accordingly, the Treaty is a potential source of particular legal rights for indigenous people; and a political statement of policy.[63]

Having made that observation as to the substance of the Treaty, Judge Durie states that he is not convinced that the most beneficial basis for Maori/Pakeha relationship should be reliance on a judicial response. Conversely he maintains the protection of native rights should not depend on political appeal alone.[64] McHugh, another commentator on indigenous people's legal rights confirms this dilemma.

A purely political process is viewed as being unsatisfactory to resolve native claims. Negotiation, conciliation and settlement rather than adversarial confrontation is regarded as being more appropriate when dealing with such issues.[65]

The Tribunal as a mechanism is a compromise between the judicial and political elements of Treaty issues. The Crown maintains it cannot be bound by the Tribunal in respect of what are policy matters. The High court maintains that the Tribunal's reports do not deal with legal reality despite judicial endorsement by the Court of Appeal of the Treaty principles distilled by the Tribunal.[66] It is submitted that the Tribunal has accordingly achieved a fair balance in terms of its procedure, and in terms of the substance of its recommendations. Judge Durie has accurately described the Tribunal as working within a semi-legal framework:[67].

> The Tribunal; investigates, researches, makes finding on past practices and current policy in light of the Treaty and then recommends in the context of modern practicalities.

Can we ask anything more from such a body? Is it viable for any agency to do more without upsetting the balance?

His Honour notes that this semi-legal approach has the benefit of:-[68]

(a) A judicial tradition to bring order to its proceedings and provide a level of independence from political interference.

(b) Making specific findings of fact and interpretation in the context of a particular case.

(c) Restoring Maori faith in legal processes.

(d) Preventing claims from being restricted by political necessities. The facts have to be determined before a settlement is reached.

(e) Allowing for the accumulation of Treaty jurisprudence, rendering both the Maori and the Crown's position more certain.

The Tribunal in its semi-legal framework acts as a guide for the Courts and the Crown. This allows for the longterm development of a political, social and legal framework which may be referred to by the judiciary when it is required to have regard to the Treaty, and by the executive in its political negotiations outside the Tribunal.

6. The Future of the Tribunal

McHugh notes that native land claims are polycentric problems - there being too many insoluble issues for any one agency to handle.[69] Clearly the legal and political character of Maori claims have that feature. There existed in New Zealand no institution capable of addressing such issues within the compass of its own resources and expertise.

The Waitangi Tribunal has proven itself able to tackle those issues. In doing so, it is creating Treaty jurisprudence rendering the interpretation of the Treaty more certain. As the Tribunal continues to "charter a course between judicial and political responsibility"[70] it is becoming increasingly apparent that its semi-judicial flexibility is the main reason for its success. Its lack of power to bind claimants and Crown has allowed it to have special regard to a wider sense of social justice allowing for practical and realistic solutions. It is doubtful whether the Tribunal would have been so successful if its recommendations were binding. Ultimately the Tribunal, being a creature of statute is dependant on the political administration of the time, its history is indicative of that.

Fortunately Maori claims are now being recognised as being legalistic in nature rather than just moral and the jurisprudence being accumulated by the Tribunal is enhancing its own future as an institution of authority. This has been further advanced by the Court of Appeal's affirmation of much Tribunal jurisprudence and its promotion of the Treaty as an instrument of statutory interpretation. The present Government's confidence in the Tribunal is illustrated in the provisions of the Treaty of Waitangi (State Enterprises) Act 1988, the enlargement of the Tribunal's membership, and the greater

provision of research and administrative resources, all of which reaffirms the Tribunal's current inquisitorial and advisory function.

Presently the Tribunal continues to gain the confidence of claimants, the Crown, the Courts and the community in general. Its recommendations are being interpreted as an extension of the Treaty itself, creating a distinct Treaty obligation on the Crown and thus giving those recommendations both political and legal force. It may be that this current widespread support for the Tribunal and its work could be undermined if its decisions become binding. It is doubtful whether presently the Tribunal has the "legitimacy" in terms of its constitution, procedure and powers to bind Governments on what will become perhaps some of the most significant, social and economic issues that the country may face in the future.

C. THE INDIAN CLAIMS COMMISSION

The Waitangi Tribunal continues to develop as a mechanism for resolving Maori Treaty claims. While political opinion varies as to the exact nature of the Tribunal's character its abolition has not been actively encouraged by either main political party, and its future appears assured at least in the short to medium term.

In the United States a not dissimilar body to the Waitangi Tribunal, The Indian Claims Commission has now been extinct for over ten years. Yet for some forty-two years after the Second World War it was the focus for native American Indians seeking compensation for historic claims against the Federal Government.

While the Indian Claims Commission can be categorised with the Waitangi Tribunal, the two bodies are distinct. Each entity's function involves or did involve, the resolution of disputes between an indigenous people and central government however each institutions approach to similar issues was quite different. A comparative analysis of the two bodies is not proposed, however some examination of the Indian Claims Commission will hopefully illustrate many of the positive characteristics of the New Zealand Tribunal's approach and procedure.

1. Development of the Indian Claims Commission

On 13 August 1946, the United States Congress passed legislation that created the Indian Claims Commission. It was a legislative response to deficiencies in the existing Federal law which had frustrated American Indians pursuing treaty based claims.

Prior to the establishment of the Commission, Indian tribes had no means of pursuing grievances based on treaty rights and obligations against the Federal Government. In the mid nineteenth century Indian tribes had attempted to use the newly created United States Court of Claims. This Court established in 1855 during the United States Civil War, was a means by which former members of the southern confederacy were able to bring suit against the Government to seek compensation for losses suffered during the hostilities. It continued as a means by which United States citizens could seek redress against the Federal Government.

The Court viewed Tribes as foreign nations and the doctrine of sovereign immunity effectively barred any type of Indian tribal claim against the United States Government. In 1863 an amendment to the Courts enabling legislation specifically excluded tribal claims based on treaties from the jurisdiction of the Court of Claims. Indian tribes were limited to petitioning Congress to pass special enabling legislation to give the Court of Claims jurisdiction to adjudicate on specified Indian tribal claims. Congress enacted some 142 such Acts, the first being passed in 1881.[71]

This system of petitioning Congress caused great delay, was inefficient and limited Indians to one specific claim. Petitioning tribes had to prima facie prove their claim to Congress and then take a minor place within the list of legislative priorities of the time. These special jurisdiction Acts were limited to a particular tribe, or band, and limited the cause of action to a specific issue.

Often, litigation founded on such an enabling Act was frustrated by the Court of Claims ruling that either the basis of the claim or some additional or alternative claim lay outside the special jurisdiction which had been given to the Court. An example of this was

North-Western Band of Shoshone Indians v. United States [72]. The enabling legislation limited the claim to one based upon the "Box Elder" treaty. The Court refused to consider whether the tribe may have had a legitimate right to compensation for lost land based on an aboriginal title.[73]

The difficulties and frustrations experienced over this period were summarised in the Merriam Report of 1928.[74]

> The conviction in the Indian mind is that justice is being denied and that any co-operation between the Government and the Indian is rendered extremely difficult by the long period of time, sometimes up to forty years, required to hear and determine the claims under various jurisdictional Acts.

A succession of legislative attempts were made to introduce Bills to create a separate Court of Indian claims. On 6 January 1930 a Bill was introduced into the House of Representatives but failed to pass. In April 1934 a Senate Bill was introduced for the same purpose. It was reintroduced in January 1935. In the same year a Bill to create an Indian Claims Commission was introduced in the House of Representatives. This House Bill was preferred by the Executive which indicated to the Chairman of the Committee on Indian Affairs that it preferred the concept of a Commission, as opposed to a Court. The Secretary of the Interior, Harold Ickes, wrote to the Chairman of the Committee on Indian Affairs stating that the difficulties with the previous system had not been so much the congestion in the existing Court of Claims, but rather the unavoidable delay in assembling the requisite data that was required to be presented to that Court by various Government agencies. He noted that the House Bill creating an Indian Claims Commission placed the onus on the Commission to investigate the claims and make an independent search for the evidence. "It is believed some legislation of that type would be preferable to the establishment of a new Court for the adjudication of such claims."[75]

A Bill was introduced in the Senate to create an Indian Claims Commission in May 1935. The Bill was reintroduced again in 1937,

1940, 1941, 1944 and 1945. In May 1946, yet another Bill was introduced by Mr Henry Jackson. He stated in addressing the House of Representatives-[76]

> Let us pay our debts to the Indian tribes that sold us the land we live on... let us make sure that when the Indians have their day in Court they have an opportunity to present all their claims of every kind, shape and variety, so that this problem can truly be solved once and for all...

This Bill was passed into law by President Truman in August 1946. The political impetus to pass legislation was to improve the Federal Governments image towards minority groups. Ostensibly the reform was passed as a tribute to the contribution of Indians to the war effort.[77] The following Statement of Frank Fools Crow of the Lakota Treaty Council however may be a more accurate assessment as to the Governments motivation.[78]

> We know the underlying policy behind the Claims Commission Act and we are not fooled. The Government intends to clear title to the land illegally taken, to clear their own conscience before they terminate us ... I wonder where the white man ever got the idea that these wrongs had to be settled in his courts by his rules.

2. Indian Claims Commission

The Indian Claims Commission Act created a Tribunal consisting of three Commissioners (one being a Chief Commissioner) to decide various claims brought against the Federal Government by tribes, bands, and identifiable groups of American Indians.

The Commission had jurisdiction to hear the following claims:[79]

(a) Claims in law or equity arising under the Constitution, laws, treaties of the United States and executive orders of the President.

(b) All other claims in law or equity, including those in tort with which the claimant would have been entitled to sue in the ordinary courts if the United States were subject to such suit.

(c) Claims which would result if the treaties, contracts and agreements between the claimant and United States were revised on the grounds of fraud, duress, and unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a Court of equity.

(d) Claims arising from the taking by the United States, whether as a result of a treaty cession or otherwise, of land owned or occupied by the claimant without the payment for such land of compensation agreed to by the claimant.

(e) Claims based upon fair and honourable dealings that were not recognised by any existing rule of law or equity.

Accordingly, Indian tribes were given the same means to make claims to the Commission as Non-Indians had to the Court of Claims. However, a new set of claims was introduced. These "moral claims"[80] created a new jurisdiction which could extend to allegations of mis-management by administrative authorities of Indians financial and natural resources.

The broad jurisdiction given to the Commission was to encompass every conceivable tribal grievance, hence the additional jurisdiction based upon the principle of "fair and honourable dealings". The comprehensiveness of this wide jurisdiction was however qualified by a number of features which in many ways characterised the true motivation of the authorities in establishing the Commission.

(a) Claims were limited to those accruing before 13 August 1946. No claims arising after that date could be considered by the Commission. The Court of Claims was however given jurisdiction on a more limited basis to determine such matters.

(b) Tribes were given until 13 August 1951 to file claims with the Commission. Any claim not filed within that five year period was forever barred from consideration by the Commission. Prior to the cut-off date, 370 petitions were filed, many containing a number of claims. 605 docketed claims were ultimately filed.[81]

(c) Remedies were limited to monetary payments. In no case were the resources which the tribe had been deprived of returned, nor other substitute resources made available.

(d) In determining the quantum of relief, the Commission could make deductions based on set-offs, counterclaims and other demands that would be allowable if brought in the Court of Claims. Further-[82]

> The Commission may also enquire into and consider all money or property given to, or funds extended gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings in accounts between the United States and the claimant in good conscience warrants such action, may settle all or part of such expenditures against any award made to the claimant.

That deduction for such gratuities by the Federal Government was limited to a cause of action based on moral claims of "fair and honourable dealings".

(e) The Indian Claims Commission was given a mandate to decide all cases within ten years. Initially it was to expire on 13 August 1956. That estimate proved unrealistic and the Commission's life was extended on a number of occasions in order to allow it to deal with its large caseload. The Commission was finally disbanded on 30 September 1978 with all its unfinished business being transferred to the Court of Claims for completion.[83]

3. The Court of Claims

In 1946 the then existing Court of Claims was given jurisdiction over tribal claims against the United States that arose after the commencement of the work of the Commission in August 1946. Those claims however were limited to ones that arose under the constitution, laws, or treaties of the United States, or executive orders of the President, or if the claim would otherwise have been cognizable in the Court of Claims had the claimant not been an Indian tribe.[84]

Thus a second forum previously denied was made available to Indian groups. Further, cases transferred to the Court of Claims after the abolition of the Commission in 1978 meant that this Court was also able to deal with moral or equitable claims available under the Indian Claims Commission Act, the Court of Claims having always been able to deal with such claims on appeal from the Commission.

The Court of Claims in dealing with Indian claims post 1946 has not been subject to the same delay as many of the claims dealt with by the Commission. Obviously the currency of such claims did not require the historical investigation and research associated with the Commission's work. With only one avenue of appeal that being review by the Supreme Court, a final determination was more rapid. The Court of Claims however like the Commission has perpetuated two acknowledged difficulties: namely the cost of litigation which may bar some suits and secondly the restriction on the Court of Claims to award only monetary damages.

The establishment of the Indian Claims Commission and the continuation of that work in a more limited capacity by the Court of Claims did not prevent the resolution of a number of tribal claims based upon individual legislative intervention. For example:-

(a) Alaska Native Claims Settlement Act 1971 - extinguished all claims based on aboriginal title in Alaska in consideration for 962.5 million dollars and 40 million acres of land.

(b) In 1978, Congress passed similar legislation to resolve Indian claims to land on Rhode Island by appropriating Federal funds to purchase lands for the Indian claimants.[85]

4. Mechanics and Procedure of the Commission

The Commission's enabling legislation provided for the appointment of three Commissioners by the President (later enlarged to five). Two of the members of the Commission were required to be lawyers, with not more than two members being of the same political party. The Commissioners would hold office until the dissolution of the Commission which initially was thought to be only five years. No Commissioner was to engage in business or employment during his or her term. No Commissioner was allowed for some two years after his or her term to represent an Indian tribe, band or group, or have any financial interest in the outcome of any tribal claim. Two Commissioners constituted a quorum.[86]

The Commission was empowered to appoint a clerk and such other employees as were required to conduct its business.[87] The Commission had full power to establish its own rules of procedure.[88] Most importantly, the Commission was obliged to establish an investigation division to investigate all claims referred to it for the purpose of discovering the facts thereof. This division was required to make a complete and thorough search for all evidence effecting each claim, utilising records held in various Government Departments and agencies. This evidence was to be made available to the Commission, to the Indians so concerned and any other interested Federal agency.[89] The Commission was further given the power to call upon any Department for information and to use all records and reports made by the Committees of each House of Congress. Further provision was made to give access to Indian groups of letters, papers, documents and records that may be useful in the preparation of any claim, all of which could be used as evidence by the Commission.[90]

Indian groups were specifically entitled to retain legal counsel. The fees of such lawyers unless otherwise determined by the Indian groups would be fixed by the Commission, but were not to exceed 10% of the

amount recovered in any case.[91] The Attorney-General would represent the United States in all claims presented to the Commission and had the power to settle any claim presented. Notwithstanding that authorisation to seek compromise, it would be the official policy of the Department of Justice throughout the existence of the Commission not to make settlement offers.[92]

Monies were specifically appropriated for the establishment of a fund from which the Security of the Interior could make loans to Indian groups for use by them in obtaining expert assistance, other than the assistance of legal counsel for the preparation of any claims. No such loan would be made available if the Indian group had available on deposit in the Federal Treasury or elsewhere such money that could pay for such expert assistance. Significantly this facility to pay for expert preparation was made available via an amendment to the legislation in 1963. The loans were repayable, together with interest out of the proceeds of any judgment recovered by the tribe from its claim. If no judgment was recovered or the amount of the judgment was inadequate, the amount outstanding could be made non-repayable by the Secretary of the Interior.[93]

The Commission was required to give reasonable notice to interested parties of hearings. Such interested parties were required to be given an opportunity to be heard and to present evidence before any final determination on the claim was made.[94] The Commission was empowered to administer oaths, subpoena witnesses to attend or to produce necessary documents, and to take depositions in any State of the United States.[95]

The final determination of the Commission was to be in writing and to include:-[96]

(a) Its findings of facts upon which its conclusion was based.

(b) A statement:

(i) whether there were any just grounds for relief of the claimant and if so, the amount thereof;

(ii) whether there were any allowable offsets, counterclaims, or other deductions and if so, the amount thereof.

(c) A statement of its reasons for its findings and conclusions.

The Commission could state a question of law for the Court of Claims. There was also a right of appeal upon notice within three months from the date of the filing of the determination of the Commission to appeal to the Court of Claims.[97] This gave the Court of Claims on appeal the same jurisdiction to affirm, modify or set aside any final determination of the Commission. Determinations of question of law by the Court of Claims could be reviewed by the Supreme Court of the United States.

After the proceedings had been finally concluded, the Commission was required to report to Congress.[98] When a report to Congress indicated an entitlement by the Indian group to recover, such a report was to have the effect of a final judgment of the Court of Claims. The legislation provided for the appropriation of such sums as were necessary to pay such final determinations of the Commission. Such a payment would discharge the United States of all claims and further demands.[99]

5. Indian Claims Commission - A Court or an Inquiry

The establishment of the Indian Claims Commission involved a conscious rejection of a similar proposal to establish a specific Indian Claims Court. The Commission's task was to be completed in ten years and was viewed as an opportunity to expedite Indian claims, many of which had lasted some twenty to forty years when brought before the Court of Claims via special jurisdictional Acts. Yet the fact that the Commission was not disbanded until 1978 meant that many of the claims filed with the Commission dragged on for over 25 years.

The old system of jurisdictional Acts enabling claims to be brought before the traditionally regulated Court of Claims involved enormous cost, lobbying and delay in order to obtain enabling legislation and

the repetition of that cost, delay, preparation and investigation upon presentation of the claim to the court itself. There was the real risk of the language of the jurisdictional act failing to adequately provide for the claim intended, and the enormous use of public monies of which only a small amount was directed to any Indian. It was expected that with the establishment of the Commission such difficulties would be avoided. It was hoped that the Commission would provide final and lasting resolutions for Indian claims, and bring the use of public monies in this area to a halt.

In rejecting the concept of a court in favour of a "Commission" it was the clear intent of the legislature to place the onus of investigation and the collation of resource material on the Commission. Further, the Commission was to be sufficiently flexible to regulate its proceedings and manage its workload to meet the expectations of the legislators.

The Commission itself was specifically directed to establish an investigation division to investigate all claims referred to it. This division was to make a complete and thorough search for all evidence affecting each claim, utilising all the documents and records in the possession of the Court of Claims and several Government Departments, and to submit such evidence to the Commission.[100] Indeed, when Secretary Ickes indicated his preference for the House Bill to the Senate Bill, he commented on how the House Bill placed an onus on the Commission to complete a search for all evidence affecting Indian claims and to hold hearings, examine witnesses, take depositions and issue subpoenas. While the Commission was also required to give reasonable notice to interested parties and give them an opportunity to be heard and present evidence before making any final determination on the claim, this was no more than the recognisation of a fundamental rule of natural justice. The other procedural features and investigatory means made available to the Commission clearly indicated that the approach to be adopted was to be significantly less than adversarial.

If the legislative intent was clear, it is equally unequivocal that the Commission throughout its life did in fact adopt an adversarial

approach placing an emphasis on each party presenting its evidence before it and giving the opposing litigant an opportunity to knock that case down. Indicative of that procedural development was the 1963 Amendment which provided for loan monies to be made available to Indian tribes and groups to utilise expert assistance in the preparation and presentation of its claim. It is implicit that initially this type of work was to be done by the Commission itself. The mandatory establishment of the Commission's investigation division however saw the appointment of one staff member. No other staff member was assigned to the division and the required search for files and evidence amounted to a number of enquiries by mail to various tribes involved in the particular claim.[101]

The Commission sat as a judicial body performing no independent investigation. It was totally dependant upon the evidence adduced before it by the Department of Justice and by the claimants. There can be no doubt that this dependence on the adversarial system, whereby the Commission remained aloof from the controversies argued before it contributed to the considerable delay which saw a ten year framework expanded to a thirty-two year one.

While there was no requirement on claimants being represented by attorneys, the Attorney-General was required to be represented by legal counsel. Accordingly, no claimant who appeared before the Commission was without legal representation, further emphasizing the strict "court-like" approach the Commission chose to take. Commentators have noted that while this use of counsel to develop the complex facts caused much delay it was considered the only means to have a thorough presentation of all relevant material.[102] One of the reasons given by Margaret Pierce, one of the members of the Indian Claims Commission for this adversarial approach was that both the Indians and Congress wanted "... the facts and the law involved in Indian claims against the sovereign to be fully and finally established".[103] She confirms that the Commission adjudicated on claims which were litigated before it in a completely adversarial manner. The Government was allowed to rely on any normal courtroom defence, despite what merit it may have in comparison to the substance of the claim.

As is characteristic of claims of this type, much expert evidence was required to be adduced. Historians, anthropologists, real estate valuers and accountants were only some of the specialist witnesses that claimants and Justice Department attorneys needed to call. Typically, the claims became the subject of a number of hearings at which various issues relevant to the stage to which the claim had progressed were canvassed. It was not until 1968 that the Commission instituted pre-trial conferences, required expert testimony to be submitted in advance and had some form of pleadings presented to it to clarify contested issues.[104]

6. Performance of the Commission

Undoubtedly, the Indian Claims Commission failed to meet the expectations of Congress in terms of its intent to resolve all Indian claims within ten years of its establishment. It may be that such an expectation was unrealistic given the complexity of the claims involved. However, the procedural resources and flexibility given to the Commission had it chosen to adopt an inquisitorial character were such that its finite workload should not have extended unfinished to 1978.

The Commission itself identified three reasons for the delays. Overworked Justice Department Indian Claims Unit defending the claims. Secondly, staff shortages in the general accounting office required to provide the Commission with audits of tribal funds and property held by the Federal Government. Thirdly, the volume of work involved in reconstructing transactions stretching back a century in the chaotic state of the Bureau of Indian Affairs records.[105] It is submitted that all three sources of delay relate to resource problems outside the Commission itself and could have been resolved had the Commission taken upon itself the main burden of the investigation.

Indian Tribal grievances were not finally resolved.[106] There was a lack of notification of the Commission's establishment and/or the requirement that a tribe file its claim within the five year deadline. Congress in 1980 enacted a special jurisdictional Bill to allow the Court of Claims to hear the claim of a tribe which had failed to meet the filing dead-line because of non-notification.[107]

The Sioux and other tribes whose pre 1946 petitions were dismissed by the Court of Claims on procedural or technical grounds attempted to re-litigate their claims before the Commission. Such matters were ruled as res judicata by the Commission, despite the merits or substance of the claims remaining unstudied. The natural justice of reopening such cases led to Congress authorising the renewal of the Sioux claim in 1978 in the face of the Justice Department Indian Claims Unit's opposition.[108]

The Commission's measure of damages in most claims was based on the market value of the land at the time of its taking without adjustment for inflation. Accordingly many Indian groups despite success before the Commission continued to feel aggrieved and inadequately compensated. The Commission adopted the practice of the Court of Claims of not allowing interest unless title to the land had already been recognised by the United States and further not unless the land had been taken without the tribes' consent, such taking having been ratified by Congress. Aboriginal land never recognised by treaty as being owned by the tribe, was not recognised as giving a right to interest.

The Commission's handling of "gratuitous offsets" often proved to be inequitable. The Government invariably sought to include "gratuitous services" as being those paid with the tribal claimants own funds. The Federal Government further sought to deduct the cost of grants and contracts awarded to tribes under recent laws such as the Indian Self Determination Act 1975. It should be noted however, that the Commission was less inclined to allow deduction of "gratuities" than the Court of Claims. The Commission made findings as to offsets in 37 claims. It further approved settlements of 149 claims in offsets issues. Liquidated offsets amounted to only 9.6 million dollars, or less than 2% of all awards.[109]

As has already been emphasised the Commission's traditional procedural approach caused great delay. Its adherence to adversarial procedures, its lack of encouragement to litigants to settle claims (something specifically provided for within the Act), and its disregard of its discretion to refer questions of law to the Court of Claims were some

of the repeated criticisms made by commentators when examining the effectiveness of the Commission. In 1968, John Vance became Chairman of the Commission. He was scathing as to the way in which the Commission had then so far organised its proceedings;[110]

> ..., the Indian Claims Commission has failed throughout the time of its existence to exercise the initiative in hearing and determining the claims filed before it. It has not certified questions of law to the Court of Claims, it has given only lip service to the congressional directive to establish an investigation division. In the face of the Justice Department's policy against initiating settlement of claims, it has not actively encouraged the settlement of claims ... The Commission has chosen to sit as a court and, as a result the congressional mandate has been utterly frustrated.

It is to be noted however, that in 1972 the Commission was still being criticised for showing little imagination in adopting procedures to reduce the time of litigation.[111] The suggestion was made for the Commission to cease to operate as a court and make administrative decisions based upon its own investigation. That proposal however was acknowledged as being flawed. Indians had repeatedly been compromised by Federal agencies in the past and were supposedly opposed to any type of system short of an adversarial process. Accordingly, the suggestion was made that the best compromise would be to introduce procedural improvements requiring a greater inquisitorial input by the Commission itself.[112] Little was done to implement such reforms.

When the Commission was finally dissolved in 1978 and its remaining caseload transferred to the Court of Claims, there were nearly 100 outstanding unresolved matters although over 800 million dollars had been awarded by the Commission by this time.

7. Concluding Assessment of the Indian Claims Commission

The American Indian Claims Commission was on paper a not-dissimilar institution from the Waitangi Tribunal. The motivation however behind its establishment, the political setting in which it was established

and the mono-cultural type remedy provided resulted in the development of a typical court of a common law jurisdiction. A body which in practice can be contrasted with the Waitangi Tribunal. The "all or nothing", "win or lose" approach typical of a courtroom setting, proved to be an inappropriate means to resolve such issues. The Commission ultimately failed to "finalise" all historic Indian claims. That very objective was perhaps unrealistic if not impossible and has been acknowledged as such by the Waitangi Tribunal.

The most justifiable reason given for persisting with the adversarial approach was the desire of the Indian to avoid reliance on Federal agencies preferring to present their own case least the merits of its claim not be as thoroughly researched or as fairly presented as it could be. Given the monocultural motivation, mechanics and remedies of the Commission it would appear a justifiable fear.

It may be that the Waitangi Tribunal's more effective investigatory role and "hands on" approach is indicative of that body's greater cultural sensitivity and of the confidence the indigenous people have in its ability to research and decide Treaty issues. The Commission did not seem at any stage during its existence to enjoy such a sense of legitimacy in the eye of the American Indian.

D. THE WAITANGI TRIBUNAL AND THE INDIAN CLAIMS COMMISSION : WHY THE CONTRASTS?

Despite Congress' initial intent, the Indian Claims Commission developed into a court of law - a specialised but subordinate tier of the already existing Court of Claims. The Commission adopted an adversarial approach with all the trappings of a judicial setting. Conversely the Waitangi Tribunal is clearly not a Court.[113]

> The Tribunal is not a court. It is not an arbitral body. It has no power in its own right to determine or adjust the rights of subjects. Its function is confined to investigation and recommendation. However persuasive its research is, findings, and recommendations may be, they do not approach those of the character of a court, or a final judicial decision.

Successive New Zealand Governments have not been prepared to place the responsibility of final determination of Maori claims beyond its control. The inherent political character of the resolution of most claims would appear to limit the taking of such an option. The United States Congress however, felt able in 1946 to safely place into the hands of an independent body the task of ultimately disposing of such issues. The motivation of Congress was to establish a mechanism which would finalise all historical Indian claims - a process of putting ones "house in order". Of course the Waitangi Tribunal when first constituted was to deal with claims arising out of the Treaty of Waitangi post the enabling legislations enactment. Accordingly, one body was established to look back, the other if only initially, to look forward. That limitation on the latter body while harshly criticised as short-sighted at the time did if unintentionally acknowledge the currency of the issues with which it was to deal and removed any notion of a finite case-load for the Tribunal.

The desire of the United States legislature was motivated out of a perceived need to assimilate Indian groups into the mainstream of American society. The existence of Indian claims and their protracted settlement was seen as a deterrent to Indian people from moving away from a tribal identity less they forego some financial windfall by means of compensation for a longstanding historic grievance.[114]

> The existence of these claims is a serious impediment to progress. The Indians look forward to getting vast sums from these claims; thus the facts regarding their economic future are uncertain. They will hardly knuckle down to work while they still hope the Government will pay what they believe is due them.
>
> The efforts of the Government to make of the Indian a self-supporting and fully assimilated segment of our civilisation can never hope for complete success so long as a considerable number of Indian tribes follow the very human and natural inclination to sit back and wait for the day of payment of the claims which will bring them riches. Adjudication of those claims by the Commission ... would once and for all cause the Indians to realise that their further progress will depend upon

> their own efforts, for the claims which the Indians assert are in nearly all cases exaggerated in size and in many cases wholly without merit.

In comparison, the creation of the Waitangi Tribunal marked an official turning away from such a policy of assimilation or notion of "one people". The Treaty of Waitangi Act 1975 was an acknowledgement of the resurgence of Maori as a separate entity and of tribal self-determination. Such concepts have continued to grow since 1975 with the Tribunal's decisions emphasizing as a fundamental principle the Treaty's recognition of a partnership between two distinct peoples.

The Alaskan settlement, previously referred to in this paper and other individual Federal settlements have been interpreted in the United States as a recognition by the Federal Government of the failure of the assimilation policy of the 1940's, and of a realisation that at least the more robust Indian tribes will retain their distinct identity.

What is significant is that the proponents of the United States Indian Claims Commission hoped that by giving that agency a final decision making power, such issues would be permanently laid to rest. Yet that ability may have been the chief reason why the Commission despite deliberate legislative intent to the contrary fashioned itself as a court to fit neatly into the existing hierarchial structure of Federal Courts.

The Commission's perception of itself as a court, meant that it refused throughout its existence to exercise the initiative. It was for the parties to present the issues and the evidence. The Commission remained aloof from any investigation into the merits or historical background of a particular claim despite all the administrative machinery made available to it to research such matters. Such adherence to both strict courtroom procedure and fastidious legal analysis of claims led J.T. Vance, a former Chairman of the Commission to note[115]

> The US Indian Claims Commission has not functioned to any degree according to the broad plan of Congress. It has not functioned to the satisfaction of the Indians it was designed to aid as witnessed by the unresolved claims and present unrest. It has not been a solution; but rather, in the minds of many in Congress has become part of the problem.

The Waitangi Tribunal has no power of final determination. It may recommend certain remedies but the ultimate decision has been left to government. Many will interpret that lack of power as a weakness, but in its role as a mechanism to promote the resolution of disputes between an indigenous people and central government, that very characteristic feature may allow it to avoid the difficulties which plagued the United States experience. Judge Durie has noted his belief that the Tribunal should not be empowered to make a final and binding determination given the political nature of most claims. Further he emphasizes the importance of avoiding the artificial constraints of fitting claims into strict legal parameters. It is the substance or merit of the issues which need to be analysed. The Tribunal should not be hampered in its endeavours by the need to constantly look over its shoulder to ensure adherence to judicial traditions.[116]

> ... perhaps because it is not a power of final decision, it is not so wedded to the normal rules of law that it cannot, subject to what a review court might say adapt its procedures to accommodate Maori claimants.

The American experience was aggravated by the limited remedy that was made available to the Commission. Indian Tribes and groups were to be compensated for past injustices with money. This feature appears to have attracted little undue comment by American Commentators. The calculation of damages by the Commission involved allowance and deduction for federal monies "gratuitously" paid out by the Government in the past, although this was limited to claims based "upon fair and honourable dealings which were not recognised by any existing rule of law or equity".

This belief that historic grievances interpreted by many tribal claimants as the cause of their present economic and social difficulties could be neatly tidied up by one large grant of federal funds, illustrates an unrealistic appreciation of Indian aspirations. The Waitangi Tribunal's approach denotes a clear rejection of that "buying off" option. The rights of the Maori as encaptulated in the Treaty have been interpreted as belonging as much to future generations as to the present or the past. The United States presumption that a settlement can be reached on an absolute and final basis has been acknowledged as being unrealistic in the New Zealand setting. The Treaty of Waitangi as "a political or social contract between two people is something to be developed over time. It is not capable of a finite settlement at any particular stage in history".[117]

To that end, the Tribunal has concerned itself primarily with establishing and defining legitimate Treaty rights and principles and accumulating Treaty jurisprudence. Judge Durie has commented[118]

> The Tribunal may point to a possible settlement with a regard to a particular grievance and with a particular tribe, but the Tribunal is not restricted to the pursuit of a specific settlement as a final and binding end to all its claims by any tribe.

The Indian Claims Commission objective was the direct opposite. The Commission restricted itself to the pursuit of a specific settlement as a final and binding end to that tribe's claims against the Federal Government. That ultimate resolution was limited by a very conservative and unrealistic monetary calculation in comparison to the consequences befallen the Indian tribe as a result of the injustice that had given rise to the claims.

The best illustration of the expedient motive of the Federal Government to determine all Indian claims forever, and the unrealistic expectation of such an objective, was the requirement that all claims be filed within five years. The Commission was given another five years to adjudicate on the claims so filed; it's mission would thus be complete within ten years. Some 22 years later, after a number of

extensions of the Commission's life, it's unfinished caseload was transferred to the Court of Claims.

The Waitangi Tribunal operates under no deadlines. It's workload has increased significantly in recent years. The legislature has responded by increasing its membership, and flexibility to sit in divisions in an effort to clear the rising backlog of cases. There is however no expectation by the Government, nor the Tribunal itself that it's work will result in the conclusion of all claims. Indeed the Tribunal with only recommentory powers can finalise nothing. There is no means of using the Tribunal as a mechanism from which Maori claims can be cleared for all time. Yet the ramifications of Tribunal findings and recommendations have highlighted potentially massive national concerns. Issues ranging from off-shore fisheries to the sale of state assets have their genesis in claims to the Waitangi Tribunal. Potential solutions to such claims are not limited to monetary compensation. Accordingly the appraisal of appropriate remedies for past injustices aggravated by the long non-action of the Crown is of concern not just to "litigants" but to various interested groups and to New Zealand society as a whole.

Throughout the existence of the Indian Claims Commission the significance of any decision or award beyond the reaction of the Indian group involved was limited to the negligible impact on the Federal purse. There was little if any awakening by United States society to the injustices suffered by the indigenous Indian through the work of the Commission. It is submitted that all Congress did by empowering the Commission to arbitrate on Indian claims was to delegate the function of determining strictly valid "legal" claims by the Indians, and secondly quantifying that grievance with a monetary figure. The political and social element of the process was minimal. Despite the involvement of the federal government, the claims were hardly of even regional significance.

Thus while the Tribunal has no final binding powers of decision making, the influence of its findings and recommendations have a more significant impact than the binding judgments of the Indian Claims Commission. The criticalness of the issues before the Tribunal are

such that properly the ultimate determination of such questions need to be made by the Government of the day.

The Tribunal does not fit into any hierarchial structure, it stands quite apart from both the Courts and the other branches of Government. Apart from its susceptibility to judicial review, it operates independently from any appellant court. As has already been examined, the Tribunal as a specialist body with growing expertise will be used by the courts as an authorative resource upon which to draw, while the Government will increasingly find the pressure not to follow Tribunal recommendations difficult to resist. The latter more so when the Tribunal continues to provide practical working solutions to these vexed issues. While recognising legitimate Maori grievances over past injustices and the perpetuation of the consequences thereof in today's society, the Tribunal has sought a "practical application of Treaty principles" to various specific factual situations that have been brought to its attention. Accordingly, while the significance of the social and political consequences of Treaty issues with which the Tribunal must deal effectively deny any realistic suggestion of wide binding powers of decision making, the practical solutions embodied in its recommendations have been such that Government has had difficulty in resisting the Tribunal's proposals. This is especially so in the light of judicial endorsement of the "legal" and "factual" findings of the Tribunal. Had the Tribunal chosen to adopt the traditional adversarial approach exhibited in the Indian Claims Commission, the Tribunal's effectiveness would be severely limited.

Despite similar administrative and procedural machinery being made available to the Commission it chose, despite the intent of Congress to sit as a court. It rejected the inquisitorial approach and perpetuated many of the problems experienced by claimants prior to the Commission's establishment. It did however have the power of making final binding decisions. Accordingly it perceived a need to interpret the issues argued before it by legal counsel in a strict legal context. The Commission ignored to a large degree the social character of many of the claims unless such an element could be incorporated in some legal right or obligation. The political element, intrinsically a part of the Tribunal's work in New Zealand

was an insignificant influence on the Commission at least throughout the 40's and 50's. The Commission was not required to have any regard to the "practical application" of its findings because the impact of any decision was so limited.

The significance of that power of binding the federal government to a financial commitment was further diminished when the means of distributing awards is studied. Initially the Bureau of Indian Affairs distributed the funds without authority from Congress. The monies being transferred to a type of trust account administered by the Bureau to be made available for purposes agreed on by the Bureau and the tribes. In 1960 however, the distribution of funds came directly under the control of Congress with specific legislation being required setting forth the purposes for which the funds were to be used. Thus budgets, reports and plans were required to be submitted before legislative authority could be obtained. By 1973 this process was proving too bureaucratic and responsibility for such financial planning was re-delegated back to the Department of the Interior. This still required the Department of Indian Affairs to hold public hearings and submit a distribution plan to Congress detailing how the funds were to be spent. If within sixty days neither House of Congress rejected the plan, it would become effective without requiring further legislative approval. Accordingly, while the Commission had the power to set the level of compensation, the funds were required to be separately appropriated and were then subject to administrative and for a period legislative scrutiny before a plan of distribution was agreed to by Central Government.

It may be that the Commission's adoption of the adversarial process to a large part was due to the lack of any perceived need to adopt innovative procedures. All the Commission was doing was extending the jurisdiction of the Court of Claims. While the expansion of claims to ones based upon "fair and honourable dealings" was novel, the Commission had a court like function, namely to compensate parties who had sufficiently proved their cause of action. The social and political implications of such a process went no further than existing Federal policy.

E. CONCLUSION

Four distinct approaches for settling the claims of indigenous peoples can be identified.[119]

Firstly, there is a pure judicial approach whereby legal entities can bring proceedings in a court of law for past injustices. While satisfactory when dealing with what Durie DCJ describes as justiciable claims clearly definable at law, the courts are less suitable in determining the non-justiciable questions relating to the sharing of political power and economic resources. In New Zealand the indigenous people are further limited in their use of the courts by the need for specific legislative reference to the Treaty and its principles. Notwithstanding the more liberal use of the Treaty of Waitangi as a means of statutory interpretation, that limitation remains a considerable barrier. Leaving aside however the legal complexities, it is apparent that a judicial response in an adversarial setting whereby each claim is reduced to an "all or nothing", "win or lose" formula is not appropriate. The differences between the parties are accentuated and conflict promoted. This is further aggravated when dealing with what are often emotive issues; tension, necessarily racial is heightened. This is to be avoided.

Secondly, there is the legislative process. An example of this is the Alaskan settlement in the United States whereby a negotiated agreement between the Alaskan Indian and the United States Federal Government resulted in specific legislation being passed to give effect to that contract. Such a solution presupposes that an ultimate or final resolution is possible. It also assumes that a just resolution will equate with political reality. That will not be the case if the process by which such a decision is made operates in a vacuum. Unless the indigenous people carry considerable political influence the success of such a legislative response it is submitted is dependent on the operation of one of the other three types of agencies referred to.

Thirdly, there is the pure administrative approach exemplified in Canada with its Indian Claims Commissioner. An individual appointed outside Government and the Indian community to inquire into various issues in consultation with the indigenous people to promote a means

for settling certain tribal grievances. Via consultation, inquiry and recommendation as to appropriate means of adjudication, the Commissioner is empowered not to make settlements or even recommend settlements, but to promote the machinery or processes by which negotiation can be entered into with the Government in relation to specific cases. The Commissioner acting as a mediator or middleman might preside over such negotiations in an attempt to promote common ground and to encourage settlement.[120]

Fourthly, there is the special Tribunal or quasi administrative/ judicial approach. Clearly the Waitangi Tribunal is illustrative of that type of body, as was at least in theory the American Claims Commission. The Commission placing an onus on its judicial characteristic, the Tribunal perhaps on its administrative flavour. Of all these mechanisms each perhaps has its place in one form or another to deal with the type of grievances, both historic and current that have arisen between indigenous peoples and central government. The appropriateness of the device or combination of mechanisms chosen for settlement of the issue is crucial. If a solution is to be obtained in an efficient and effective manner, clearly the experience of that process will have an important bearing on the satisfaction which is obtained by the aggrieved party, if and when it obtains a remedy. "Settlements which have a lingering bad taste are not settlements at all and simply set the stage for future strife."[121] As mentioned previously in this paper such claims by indigenous peoples involve "polycentric" problems.[122] The process of settlement involves not just the resolution of a contractual dispute, nor the correction of past wrongs, it also involves the establishment of a reasonable basis for the future of a people. More so, when the concept of self-determination is being promoted.

This paper has not attempted to determine the best approach to settling disputes between indigenous peoples and Governments however it is hoped that a more appropriate process has emerged via this examination of the Waitangi Tribunal and the American Claims Commission. Both forums have been classified in the fourth category of "special tribunal". The Commission adopted however a purely judicial approach. It ignored the political and social implications

of such claims that are inherently recognised in the second classification "the legislative process", and preferred to disregard any active participation in the promotion of itself as a means by which a negotiated settlement might be obtained, thereby avoiding any association with the type of process described in the third "Canadian type classification". As a result the United States experience with the Indian Claims Commission has not been viewed positively.

The Waitangi Tribunal as stated is a quasi administrative/judicial body appropriately categorised in the fourth classification. It however either draws on or can be associated with any of the three other stipulated processes of resolving native people's grievances. It has chosen to regulate its proceedings in a semi-judicial manner and accumulate consistent Treaty jurisprudence. It has also however acknowledged the political character of its business in the practical recommendations that it has made to Government. Finally it has not denied itself the opportunity to promote constructive communication and encourage "settlement". Given the substantial ramifications of many Treaty issues on a small country like New Zealand the Tribunal has maintained the requisite flexibility to chart an appropriate course through the political, social and legal complexities of its task. It appears to have proved itself an apt mechanism to deal with the issues arising between the indigenous Maori people and the Government.

FOOTNOTES

1. E T J Durie, "The Waitangi Tribunal : Its relationship with the judicial system" [1986] NZLJ 235.

2. NZ Parliamentary Debates 8 November 1974 : 5725.

3. Ibid, 5726.

4. Treaty of Waitangi Act 1975, S 4.

5. Idem.

6. Idem.

7. W M Wilson "The Waitangi Tribunal" New Zealand Law Society Seminar, The Treaty of Waitangi (April 1989) 23 and M P K Sorrenson "Towards a Radical Reinterpretation of New Zealand History : The role of the Waitangi Tribunal", Waitangi : Maori and Pakeha Perspectives of the Treaty of Waitangi (1989) Edit by I H Kawharu, 161.

8. Parliamentary Commissioner for the Environment Environmental Management and the Principles of the Treaty of Waitangi - Report on the Crown Response to the Recommendations of the Waitangi Tribunal 1983-1988 (1988) 42-43 and Motunui Report pp 62-65.

9. Idem.

10. Above n7, 24.

11. Idem.

12. M P K Sorrenson "Towards a Radical Reinterpretation of New Zealand History : The role of the Treaty of Waitangi", Waitangi : Maori and Pakeha Perspectives of the Treaty of Waitangi (1989) Edit by I H Kawharu, 163.

13. Ibid, 161.

14. Ibid, 163.

15. Above n8, 11.

16. Above n8, 12 and Above n7, 25.

17. Above n8, 12-13 and Above n7, 25.

18. Above n8, 13.

19. Above n8, 13-14.

20. Above n8, 14 and n12, 174.

21. Above n8, 100 and n7, 26.

22. Te Weehi v. Regional Fisheries Officer (1986) unrep, M662/85 Christchurch.

23. [1987] 1 NZLR 641.

24. Treaty of Waitangi (State Enterprises) Act 1988, S 10.

25. Ibid, S. 4.

26. Above n1, 235.

27. Above n7, 27.

28. Idem.

29. Above n7, 28.

30. Above n1, 237.

31. Above n23.

32. Ibid, 661.

33. Ibid, 689.

34. Above n8, 17.

35. (1989) unrep, CP 553/87 Wellington.

36. Ibid, 16.

37. Above n7, 29; n8, 115.

38. Above n23, 664.

39. Above n7, 28.

40. Above n8, 9.

41. Above n1, 236.

42. P G McHugh, "The Constitutional role of the Waitangi Tribunal" [1987] NZLJ 224, 225.

43. E T J Durie "Understanding the Treaty" New Zealand Law Society Seminar, The Treaty of Waitangi (April 1989) 12.

44. Above n12, 161-162.

45. "Treaty Interpretation in the English Courts", International and Corporate Law Quarterly XII (1963) 508 cit. Idem. cit Motunui Report 56-7.

46. Motunui Report 58.

47. Ibid, 55.

48. Above n23, 681.

49. Chief Judge E T J Durie "Understanding the Tribunal" New Zealand Law Society Seminar, The Treaty of Waitangi (April 1989) 15.

50. (1899) 175 US1.

51. Motunui Report 59.

52. Above n12, 163.

53. Above n51, 6.

54. Above n12, 168.

55. Manukau Report 77-78.

56. Te Reo Maori Report 11.

57. Idem.

58. Above n12, 171.

59. Ibid, 173.

60. Mangonui Sewage Report 7.

61. Idem.

62. Above n1, 235.

63. Ibid, 236.

64. Ibid, 237.

65. Above n42, 225.

66. Above n35 and Above n23.

67. Above n1, 237.

68. Idem.

69. Above n42, 233.

70. Above n1, 233.

71. F. Cohen Handbook of Federal Indian Law (1982) 563.

72. 324 US 335 (1945).

73. Above n71.

74. Ibid 564.

75. J.T. Vance "The Congressional Mandate and the Indian Claims Commission" (1969) 45N Dak LR 325, 327-328.

76. Ibid, 328.

77. Ibid, 325 and R.L. Barsh "Indian Land Claims Policy in the United States" (1982) 58N Dak LR 7, 11.

78. R.L. Barsh "Indian Land Claims Policy in the United States" (1982) 58N Dak LR 7, 11.

79. Indian Claims Commission Act 1946, S 70a.

80. M.H. Pierce "The Work of the Indian Claims Commission" (1977) 63 ABAJ 227, 229.

81. Above n75, 329 and Idem.

82. Above n79.

83. N1, 564.

84. Ibid, 561.

85. Ibid, 562-563.

86. Above n79, S 70b.

87. Ibid, S 70c.

88. Ibid, S 70h.

89. Ibid, S 70l.

90. Ibid, S 70m.

91. Ibid, S 70n.

92. Above n75, 334.

93. Above n79, S 70n-1.

94. Ibid, S 70p.

95. Ibid, S 70q.

96. Ibid, S 70r.

97. Ibid, S 70s.

98. Ibid, S 70t.

99. Ibid, S 70u.

100. Above n89.

101. Above n75, 333.

102. Above n111, 1122.

103. Above n80, 231.

104. Above n102.

105. Above n78, 16.

106. Ibid, 17.

107. Idem.

108. Idem.

109. Ibid, 20.

110. Above n1, 335.

111. Notes - "Toward a New System for the Resolution of Indian Resource Claims" (1972) 47 NYU L Rev 1107, 1123.

112. Ibid, 1137.

113. Above n35, 10.

114. Above n78, 13-14 cit L. Meriam, The Problem of Indian Administration 19 (1928), and cit Secretary for the Interior Krug.

115. J.T. Vance "Indian Claims The U.S. Experience" (1974) 38 Sask L Rev 1.

116. Above n1, 237.

117. Ibid, 236.

118. Idem.

119. L.I. Barber "Indian Claims Mechanisms" (1974) 38 Sask L Rev 11, 14-15.

120. Ibid, 12-13.

121. Ibid, 15.

122. Above n42.

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5. P G McHugh, "The Constitutional role of the Waitangi Tribunal" [1985] NZLJ 224.

6. E T J Durie "Understanding the Treaty" New Zealand Law Society Seminar, The Treaty of Waitangi (April 1989) 12.

7. New Zealand Maori Council v. Attorney-General [1987] 1NZLR 641.

8. R P Boast "New Zealand Maori Land v. Attorney-General : The case of the Century? [1987] NZLJ 240.

9. Waitangi Tribunal
   - Motunui Report - March 1983
   - Kaituna Report - November 1984
   - Manukau Report - July 1985
   - Te Reo Maori Report - April 1986
   - Waiheke Report - June 1987
   - Orakei Report - November 1987
   - Muriwhenua Report - June 1988
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10. New Zealand Parliamentary Debates.

11. F Cohen Handbook of Federal Indian Law (1982).

12. J T Vance "The Congressional Mandate and the Indian Claims Commission" (1969) 45 N Dak LR 235.

13. J T Vance "Indian Claims The US Experience" (1974) 38 Sask L Rev 1.

14. R L Barsh "Indian Land Claims Policy in the United States" (1982) 58 N Dak LR 7.

15. M H Pierce "The Work of the Indian Claims Commission" (1977) 63 ABAJ 227.

16. Notes - "Toward a New System for the Resolution of Indian Resource Claims" (1972) 47 NYU L Rev 1107.

17. L I Barber "Indian Claims Mechanisms" (1974) 38 Sask L Rev 11.

18. Williamson "Indian Tribal Claims before the Court of Claims" (1966) 55 Geo LJ511.

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